Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

ERWIN N. GRISWOLD
(Counsel of Record)

PAMELA S. EDDY
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Counsel for the Petitioner

Of Counsel

JAMES E. DARR, JR.
EICHENBAUM, SCOTT, MILLER,
CROCKETT, DARR & HAWK, P.A.
SUITE 1400
UNION NATIONAL BANK BUILDING
ONE UNION NATIONAL PLAZA
LITTLE ROCK, ARKANSAS 72207
(501) 376-4531

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER	1
A. The Court Below Engaged in Unwarranted Fact Review	2
B. The Respondents' Arguments Flout the Actual Decision of this Court in *Hazelwood*	4
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES:	
Hazelwood School District v. United States, 433 U.S. 299 (1977)	2,4,5
KCST-TV v. Federal Communications Commission, No. 81-2265 (D.C. Cir., Jan. 25, 1983)	2
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	2
Pullman-Standard v. Swint, 102 S. Ct. 1781 (1982)	1,4
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	3
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	2
STATUTES AND RULES:	
Fed.R.Civ.P. 52(a)	2,3,4
5 U.S.C. § 706(2)(A)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1220

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONER

The respondents' contention that the petition does not present questions worthy of this Court's review is not well-founded. The proper scope of appellate review may not be a question *dividing* appellate courts. Respondents' point that no conflict exists among the circuits, therefore, is inapposite. Indeed, the heavy criticism directed toward this trend shows that it is generally followed by appellate courts, and thus presents this Court with an important issue. Moreover, the respondents are unwarranted in their claims that the decision below does not conflict with decisions of this Court. In particular, the court below, by independently reviewing the facts, disregards this Court's decisions defining the proper scope of appellate review. *See Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982). And, the appellate court's use of employment

statistics, undifferentiated by job skills, conflicts with this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

A. The Court Below Engaged in Unwarranted Fact Review.

The Rules of Civil Procedure make it clear that appellate courts are bound to accept the findings of fact of district courts unless those findings are "clearly erroneous". Fed.R.Civ.P. 52(a). The "clearly erroneous" rule was simply stated by this Court in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). Similarly, appellate courts may not set aside a district court's discretionary decision unless the decision is an abuse of discretion. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981), this Court held that "the Court of Appeals seems to have lost sight of this rule and substituted its own judgment for that of the District Court." Failure to follow these standards, commentators warn, leads to increased appellate caseloads, disrespect for the judicial system, and an inefficient allocation of judicial responsibilities. *Cf. KCST-TV v. Federal Communications Commission*, No. 81-2265 (D.C. Cir., Jan. 25, 1983).[1]

A review of the treatment of the facts by the court below here confirms the conclusion that it did not follow these proper standards of review, notwithstanding its affirmance in part of the district court's findings.[2] The appellate court found that

---

[1] *KCST-TV v. FCC, supra*, involved judicial review of administrative action under 5 U.S.C. § 706(2)(A) (1976) (abuse of discretion standard). Judge Scalia, in dissent, criticized his colleagues and recognized the self-imposed dilemma of appellate courts when they engage in independent review of facts and discretionary decisions:

> I believe that our readiness to entertain challenges of this sort, and to require the type of "fine tuning" the majority demands, is one of the factors contributing *to regulatory delay and to the increasing caseload of the courts.*

KCST-TV, supra, slip. op. at 1 (Scalia, J., dissenting) (emphasis added).

[2] The fact that the appellate court affirmed some of the district court's findings can hardly show that the court properly overturned others. Rather it tends to show that the court below undertook independent redetermination of all of the district court's findings, contrary to Rule 52(a), and this Court's

(*footnote continues*)

intervenor Mosely had been discriminatorily discharged. In contrast, the district court found that Mosely was discharged because she had twice failed to follow a reasonable order, an action expressly prohibited in the bank's personnel manual.[3] Similarly, the appellate court found intervenor Riley's testimony credible, in disregard of the credibility determinations made by the district court judge. *See* Pet. at 3. Finally, the appellate court found the receipt of unemployment compensation by discharged employees to be probative of racial animus; the district court made no finding of the relevance of unemployment compensation.

Respondents, however, assert that the appellate court's upholding of some of the district court's findings of fact is proof of their claim that *all* facts were given the benefit of the Rule 52(a) and abuse of discretion standards of review.[4] In so

---

(*footnote continued*)

decisions. Despite the respondents' suggestion to the contrary, Brief in Opp. at 14 n.8, this Court need not review all of the evidence presented below to conclude that the appellate court independently considered the facts on appeal. This conclusion is instead inescapable from a comparison of the appellate opinion and the opinion of the district court.

[3] A comparison of the other facts comprising the appellate court's findings on the discharge claim included:

> The plaintiffs established a prima facie case of racial discrimination regarding the bank's discharge of black employees. They did so by proving a history of discrimination in the bank's employment practices, by introducing statistical evidence that showed that blacks with less than two years of service were discharged at more than twice the rate of white employees in the same group. . . .

Pet. App. A at 24a-25a. The district court's findings of fact, on all counts, are to the contrary. *See* Pet. App. B at 81a, 96a.

[4] A review of the appellate court's *affirmance* of one of the district court's findings demonstrates the weakness of respondents' claim. The appellate court accepted the district court's finding that petitioner had articulated a legitimate, non-discriminatory explanation for its failure to promote intervenor Riley. Pet. App. A at 27a (promotion of more qualified employee). *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Notwithstanding this affirmance, the appellate court then found that the district court's ruling of no discrimination was "clearly erroneous." The failure of the appellate court to give effect to its affirmance of the district court's

(*footnote continues*)

limiting their opposition to this narrow point, respondents fail to consider the type of appellate review which the court below clearly engaged in—review that

> strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Pullman-Standard v. Swint, 102 S. Ct. at 1791.

This "independent consideration" of the facts is evidence of the widening scope of appellate review. This Court's consideration is necessary to control this trend, and the adverse consequences associated with it.

B. The Respondents' Arguments Flout the Actual Decision of this Court in *Hazelwood*.

Respondents maintain that the appellate court correctly relied upon a gross statistical analysis in concluding that the district court had clearly erred in finding that the petitioner had not discriminated in promotions. And the respondents further suggest that the district court "compounded" its erroneous holding by ignoring other evidence of discriminatory intent. Respondents' position proceeds not only upon a misunderstanding of this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), but, indeed, amounts to a contention which is precisely contrary to this Court's actual decision in the *Hazelwood* case.

The appellate court's analysis of the promotional subclass claim focused on statistics reflecting only a fragment of the petitioner's entire work force. According to the appellate court, the bank's policy of promoting from within allowed the court to use the bank's *internal* labor force as the basic labor pool from which to draw statistical comparisons. Upon finding that blacks within the bank received a small percentage of promotions to

---

(*footnote continued*)

finding under *Burdine, supra*, when it then imposed liability upon the petitioner for failure to promote Riley, belies complete adherance to the requirements of Rule 52(a).

the bank's three highest salaried positions, the appellate court drew an inference of discrimination. *See* Pet. App. A at 19a.[5]

In support of the decision below, respondents would have this Court accept the appellate court's assumption that *all* of petitioner's employees were equally qualified for the highest level salaried positions. This position is clearly the opposite of this Court's holding in *Hazelwood* that when "special qualifications" are required for the promotion in question, gross statistical analysis is inappropriate.[6] Moreover, respondents' position imposes a self-defeating standard upon employers with affirmative action programs; the decision below forces employers to consider and exceed their own affirmative hiring accomplishments when making promotional decisions.[7]

Respondents also state that the district court's failure to find discrimination in promotion was enhanced by its failure to recognize other indicia of discrimination. Respondents' statement, however, ignores the district court's findings of fact which support its ruling. The district court considered a number of factors important in its finding that there was no "intent" to discriminate; including (1) the bank's active and successful

---

[5] The district court had considered statistics comparing the expected number of promotions received by blacks to the observed number of promotions received by blacks; in every year but 1978, blacks were promoted at a considerably higher rate than would have been expected. Pet. App. B. at 69a-70a.

[6] As this Court held in *Hazelwood*, the proper statistical pool for teaching positions included only those persons with teaching skills. The proper pool for statistical analysis of promotions to the bank's highest salaried positions, therefore, is the pool comprised of those persons with the skills needed for those positions.

[7] Respondents also mistakenly represent that petitioner admits that the district court's decision was, in part, clearly erroneous. Brief in Opp. at 13-14. It is petitioner's position that the appellate court's decision conflicts with many of this Court's decisions precisely because of the appellate court's failure to limit the scope of its review. For example, the appellate court's finding that petitioner had a policy of promoting from within was a fact not found by the district court. This finding allowed the appellate court to apply the internal work force statistical comparision, and to disregard the district court's statistical analysis. Pet. App. A at 19a. *See also* Arkansas State Chamber of Commerce and Associated Industries of Arkansas, Inc., Amici Curiae Brief at 11-14.

affirmative action plan, (2) its role in training minorities for the banking profession, and (3) statistics demonstrating the over-representation of blacks in all levels of the bank's work force. Contrary to the respondents' suggestion that petitioner's actions had a "devastating effect on the promotional opportunities of blacks," Brief in Opp. at 17, the district court's findings of fact demonstrate the bank's intent to facilitate the career advancement of its black employees, and the success of the bank in that effort.

CONCLUSION

Review by this Court of the decision below is necessary to curtail the growing trend of appellate courts to undertake independent review of findings of fact and discretionary decisions. Direction is also needed from this Court so that appellate courts will correctly analyze employment statistics without disturbing the affirmative action objectives of Title VII.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)

PAMELA S. EDDY
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Counsel for the Petitioner

Of Counsel

JAMES E. DARR, JR.
EICHENBAUM, SCOTT, MILLER,
CROCKETT, DARR & HAWK, P.A.
SUITE 1400
UNION NATIONAL BANK BUILDING
ONE UNION NATIONAL PLAZA
LITTLE ROCK, ARKANSAS 72207
(501) 376-4531

MARCH, 1983